

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL MAINVILLE and DAVID
PROVENCHER,

UNPUBLISHED
October 16, 2003

Plaintiffs-Appellants,

V

No. 243543
Dickinson Circuit Court
LC No. 00-011534-CK

LOUISIANA PACIFIC CORPORATION,

Defendant-Appellee.

Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Plaintiffs, Michael Mainville and David Provencher, appeal the grant of summary disposition to defendant, Louisiana Pacific Corporation, and the dismissal of this case. We affirm.

I. Facts and Procedural History

This breach of contract case arises out of the sale of uncut timber on two contiguous tracts of land in Marquette County. Mainville and his wife, Laura Mainville, owned one parcel of land by the entireties and David Provencher's wife, Beth Provencher, owned the other parcel. Michael Mainville and David Provencher each entered a contract with James Grenz of Northern Timber & Land who represented himself as an agent of defendant, Louisiana Pacific. Michael Mainville's contract provided that the buyer shall pay at least \$98,600 to log approximately 320 acres of land and that Northern Timber & Land had permission to enter the property and to cut and remove the timber. David Provencher's contract is nearly identical, but states that the buyer shall pay at least \$76,760 for the timber on approximately eighty acres of the Provencher land. Michael Mainville and David Provencher filed this breach of contract action and alleged that Louisiana Pacific stopped logging and only paid a portion of the amount stated in the agreements.

Louisiana Pacific filed a motion for summary disposition under MCR 2.116(C)(10) and argued that both contracts were null and void when entered because Michael Mainville and

David Provencher signed the contracts, but they did not own the property at issue. The trial court ultimately agreed with defendant and dismissed plaintiffs' case.

II. Analysis¹

The trial court correctly granted summary disposition to Louisiana Pacific. As a matter of law, neither Michael Mainville nor David Provencher had a full ownership interest in the properties or, by extension, in the standing timber growing on the land.

Michael Mainville owned the realty with his wife, Laura Mainville, as tenants by the entireties. It is well-settled in Michigan that "neither spouse, acting alone, can convey or contract to convey to a third person property held as tenants by the entireties." *Williams v DeMan*, 7 Mich App 71, 74; 151 NW2d 247 (1967). Mainville argues that he could enter the contract without his wife's signature because standing timber has been reclassified as "goods" under Michigan's version of the UCC. MCL 440.2107(2) provides:

A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

The official comments to MCL 440.2107 state:

Several timber-growing states have changed the 1962 Code to make timber to be cut under a contract of severance goods, regardless of the question who is to sever them. The section is revised to adopt this change. Financing of the transaction is facilitated if the timber is treated as goods instead of real estate. A similar change is made in the definition of "goods" in Section 9-105. To

¹ This Court reviews a trial court's grant of summary disposition de novo. *Old Kent Bank v Kal Kustom, Enterprises*, 255 Mich App 524, 528; 660 NW2d 384 (2003). As this Court also explained in *Old Kent*:

Summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue about any material fact. When deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider all pleadings, affidavits, depositions, and other documentary evidence in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The nonmoving party has the burden of rebutting the motion by showing, through evidentiary materials, that a genuine issue of disputed fact does exist. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). [*Id.* at 528-529.]

protect persons dealing with timberlands, filing on timber to be cut is required in Part 4 of Article 9 to be made in real estate records in a manner comparable to fixture filing.

Were we to conclude that the statute converts standing timber to personal property, it is clear that the change, made in order to facilitate financing, does not alter the manner in which standing timber is owned by husband and wife. The reclassification does not otherwise negate existing common law rules regarding ownership of timber and, as defendant notes, Michigan's UCC provisions explicitly state that, "[u]nless displaced by the particular provisions of this act," common law principles supplement the provisions. MCL 440.1103.

This case is controlled by *Mulder v Durand Hoop Co*, 238 Mich 373; 213 NW 106 (1927), in which our Supreme Court held that a husband alone may not sell standing timber on land owned by husband and wife by the entireties. *Id.* at 375-376. The Court opined:

Any conveyance by either without the other is void. And this is true whether the conveyance be regarded as a sale of realty or of personalty. [In] *In re Morris' Estate*, 210 Mich 36; 177 NW 266 [(1920)], this Court held:

'Where standing timber is owned by a husband and wife by the entireties, the rule that the title to the same vests in the survivor is applicable after it is severed from the land.'

The *Mulder* Court further stated, at 375-376:

Now if the right of survivorship exists as to timber that has been severed from the land, how can the husband defeat that right by any conveyance that he alone might make[?] It is plain that he cannot do so. Our attention has not been called to any decision of this court directly in point, but on principle it must be that where the title to standing timber is held by the entireties, no sale is valid unless the wife joins in the conveyance. And it is immaterial that she consented to the sale. Her oral acquiescence would not render the conveyance operative against her. When Mr. Casler made this contract with the defendant, he was attempting to sell property in which he had no separate interest or undivided share. His interest and his wife's interest were one; and whether the instrument which he signed be called a 'deed' or a 'bill of sale,' it could pass no title without the signature of his wife.

We think that for the reasons stated, the contract upon which the defendant relies was a nullity.

While, arguably contrary to the definition in the UCC, the *Mulder* Court characterized standing timber as real property, the Court clarified that, if the land is held by the entirety, whether standing or cut, the sale of timber must be entered by both spouses, "[a]nd this is true whether

the conveyance be regarded as a sale of realty or of personalty.” *Id.* (Emphasis added.)² Under *Mulder*, if the land is held as a tenancy by the entirety, a contract by one spouse to sell the timber is a nullity. *Id.* at 375-376.³

We reject Mainville’s argument that he acted as an agent for his wife in entering the contract. As discussed, notwithstanding Laura Mainville’s verbal acquiescence to the transaction, both signatures were required to validly transfer the timber because the property was held in tenancy by the entireties under *Mulder*.

As to the Provencher contract, it is clear that David Provencher had no ownership interest in the property and, therefore, was precluded from contracting to sell it. He raises only one argument for reversal, that Provencher acted as his wife’s agent in entering the agreement. While an agency relationship may arise between husband and wife, there must be evidence of it in the form of “the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” 1 Restatement Agency, 2d, § 1(1), p 7; see also 1 Restatement Agency, 2d, § 22, p 94. The comments to the rule, 22(b), p 94 provide:

² See also *Morris*, *supra* at 39-44, and *Dickey v Converse*, 117 Mich 449; 76 NW 80 (1898).

³ We are also persuaded by the reasoning of *Sielecki v Sielecki*, 107 Pa Super 291; 163 A 375 (1932), which echoes the principles in *Mulder* and offers another argument in support of defendant’s position. In *Sielecki*, the Court held that, if the land is held by the entireties, a husband may not enter a contract to sell standing timber if his wife has not also entered the agreement. While, in this case, Michael and Laura Mainville may well have agreed among themselves to sell the timber, if we changed the common law rule to allow one spouse to unilaterally sell standing timber, the situation in *Sielecki* may arise:

It is apparent, therefore, that, if the decree in this case must be affirmed, Apolenia Sielecki, one of the tenants by entireties of a half interest in the farm, will not only be prejudiced by having the value of her estate seriously diminished through joint acts of her husband and a stranger, which acts, so far as her interest is concerned, amount to waste but will also be defrauded out of any part of the grossly inadequate consideration which Wright agreed to pay for the timber. [*Id.* at 293-294.]

In other words, if one spouse may sell standing timber on land held by the entireties, and if the spousal relationship is acrimonious, it may result in one spouse unilaterally diminishing the value of the real property, to the detriment of the other spouse, also a unified owner of the whole; similar to *Sienecki*, one spouse could sign a contract to allow a third party to clear cut trees and buy the timber without the other spouse’s notice or acquiescence. A tenancy by the entireties is intended to give a surviving spouse the property in fee. Severing the interest in timber would defeat the purpose of owning land by the entirety - to ensure that the surviving spouse takes the whole and to ensure no part may be diminished, encumbered, sold or devised by one spouse or the other. See *Dickey*, *supra* at 455.

Neither husband nor wife by virtue of the relation has power to act as agent for the other. The relation is of such a nature, however, that circumstances which in the case of strangers would not indicate the creation of authority or apparent authority may indicate it in the case of husband or wife. Thus, a husband habitually permitted by his wife to attend to some of her business matters may be found to have authority to transact all her business affairs. Likewise, if a wife is customarily permitted by her husband to order household supplies, authority or apparent authority on her part to purchase things needed in the household can be readily inferred. However, the fact that married women in the community customarily do this is not alone a basis for creating authority or apparent authority.

“The test of whether an agency has been created is whether the principal has a right to control the actions of the agent.” *Meretta v Peach*, 195 Mich App 695, 697-698; 491 NW2d 278 (1992), citing *Little v Howard Johnson Co*, 183 Mich App 675; 455 NW2d 390 (1990).

Here, plaintiffs presented little evidence to establish an agency relationship between Beth and David Provencher: (1) David Provencher testified that he talked to his wife before he signed the contract and he also testified that he had his wife’s permission to sign the contract, and (2) Beth Provencher submitted an affidavit in which she stated, in pertinent part:

5. I am not familiar with matters of this kind and therefore, David, with my permission, engaged in the negotiations and signed the agreement.

6. At all times, David had my permission to sell the timber.

We agree with defendant that the evidence does not establish that Beth Provencher retained the right or authority to control David Provencher’s actions. Further, nothing in the record indicates an implicit agency relationship whereby David Provencher was habitually permitted by his wife to attend to some of her business matters to infer an agency relationship in this case.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Bill Schuette